LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 2 1964
JOHN F. DAVIS, CLERK

No. 788

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

PAUL L. TUGWELL,

Petitioner,

v.

A. F. KLAVENESS AND COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

W. C. HARVIN
MILAS C. BRADFORD, JR.
1600 Esperson Bldg.
Houston, Texas 77002
Attorneys for Respondent

Of Counsel:
BAKER, BOTTS, SHEPHERD & COATES

PRINTED IN U.S.A. — BY DELARUE TEXAS

SUBJECT INDEX

	Page
STATEMENT	1
ARGUMENT AND AUTHORITIES	4
CONCLUSION	9
CERTIFICATE OF SERVICE	10

AUTHORITIES

3 Am. Jur. Appeal & Error, §1031, page 587	8
Palmer v. Hoffman, 318 U.S. 109, 116, 63 S. Ct. 477, 482, 87 L. Ed. 645, 651	4
Smith v. Bear (2 Cir.) 237 F. 2d 79	8

No. 788

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

PAUL L. TUGWELL,

Petitioner,

v.

A. F. KLAVENESS AND COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT

The jury in this case found that the plaintiff, Paul L. Tugwell, did not sustain an injury by slipping and falling upon the deck of the M/S PLEASANTVILLE during the early morning hours of July 12, 1958, as claimed in his petition.

It is hardly surprising the jury found as it did.

The plaintiff Tugwell claimed he slipped in some oil or grease on the deck of the ship between the winch control box and the hatch coaming. Tugwell testified this fall occurred within plain view of the winch operators (Tr. 97), one of which operators, Dupre, was a friend of Tugwell's (Tr. 97).

In truth and in fact, neither operator saw any such fall (Tr. 250, 287). Dupre believed he would have seen such a fall if it had occurred as claimed (Tr. 274).

There were no eye-witnesses to the alleged accident. The testimony of the plaintiff's prime witness Hambrick, locating the alleged oil and the point of falling, was specifically disavowed by Tugwell, who stated he was not even in the area designated by Hambrick (Tr. 76, 93, 94).

Tugwell reported to the timekeeper that he injured his back while tightening a guy line, making no mention of slipping in oil or grease on the deck (Tr. 420). His compensation claim, prepared in his attorney's office, and his pleadings in this case, made no reference to any oil or grease on the deck (Tr. 383, 384). Tugwell's foreman never saw any oil on the deck nor did he see anyone who had found any oil (Tr. 321, 322).

The medical evidence left a considerable question as to whether or not the plaintiff sustained any injury whatsoever. The doctor found nothing which could not be medically explained on the basis of Tugwell's pre-existing and congenital condition, absent any accident at all (Tr. 188-189). The doctor further admitted that "whether or not an injury aggravated the pre-existing condition is a basis of relating to the patient's history." (Tr. 190).

The petitioner's attorney took great pains to initially establish that the petitioner had never sustained any injury to his low back previous to this alleged accident. On at least ten different occasions, the attorney inquired of his client concerning prior back trouble (Tr. 68, 69, 70, 71, 72, 73, 74, 82). Thereafter, when the petitioner was confronted with a report of a previous low back injury approximately one year prior to the present claimed injury, the petitioner

stated he simply had no recollection of the matter (Tr. 405, 406).

Probably the clinching evidence in this case was that concerning the petitioner's earnings since the alleged accident. The petitioner filed suit claiming damages in the amount of One Hundred Fifty Thousand Dollars ($150,000), at least partially because of a claimed loss in wage earning capacity. In truth and in fact, since this accident the petitioner Tugwell has been earning approximately Fourteen Thousand Dollars ($14,000) per year, roughly twice the amount he earned prior to the alleged accident made the basis of this suit (Tr. 85 86).

Apparently the plaintiff feels that the "image of the courts in action in the mind of . . . [Tugwell] and his circle of friends . . ." which was so seriously damaged in this case, would have been greatly enhanced if the plaintiff could have recovered One Hundred Fifty Thousand Dollars ($150,000) for reduced earning capacity to go along with his Fourteeen Thousand Dollars ($14,000) a year annual salary.

In view of the above facts, it is hardly surprising the jury made the finding it did in this case. Even the petitioner does not question the evidence is ample to support the finding of the jury.

Following a four day trial and an unimpeached jury verdict, the petitioner seeks a reversal of this case because:

1. The United States Court of Appeals for the Fifth Circuit does not understand the standard by which it is to judge whether or not an assumed error is harmless, and
2. In its supervisory capacity, this Court should reverse the case as a punishment or example to the trial court

for his statement to the petitioner's attorney, which statement was not only proper and called for under the circumstances but if in any way could be construed as derogatory towards the plaintiff's attorney was promptly cured by instructions at least partially worded by the petitioner's attorney himself.

ARGUMENT AND AUTHORITIES

In his argument as to what does or should constitute prejudicial and reversible error, counsel for the petitioner misconceives both the standard and how the standard was applied in this particular case. The petitioner would place the burden of establishing no prejudice on the respondent, which is directly contrary to law.

This Court has unmistakably set out the true standard along with the burden of proof:

> "Mere 'technical errors' which do not 'affect the substantial rights of the parties' are not sufficient to set aside a jury verdict in an appellate court . . . He who seeks to have a judgment set aside because of an erroneous ruling *carries the burden of showing that prejudice resulted.*" (Emphasis added.)

Palmer v. *Hoffman*, 318 U.S. 109, 116, 63 S. Ct. 477, 482, 87 L. Ed. 645, 651.

The Court below recognized immediately that if either of the two claimed errors were in truth errors, they had not been demonstrated to have prejudiced the result in the trial court, indeed it was clear ". . . neither of these two isolated episodes infected the result."

The Court below merely paraphrased this Court in stating:

> "We must determine whether, assuming the action under review to have been erroneous, was it really harmful to the complaining party?"

In truth it is not the standard applied by the Court below the plaintiff really deplores, it was the result reached by the Court in applying that standard.

By any standard it is clear the plaintiff was not prejudiced by either of the two alleged errors. The alleged errors consisted of (1) a remark made by the Court to the plaintiff's atttorney, which remark was fully justified and appropriate in answer to the attorney's arguing with a ruling of the Court, but in any event if the remark could possibly be considered error, such was promptly cured with an appropriate instruction, and (2) the exclusion of a piece of documentary evidence which at most could only establish facts which were otherwise established and not controverted to any degree.

Probably the single most revealing contention in the plaintiff's petition for certiorari is his emphasis and reliance upon what is either a typographical error made by the court reporter or at the very most a slip of the tongue made by the trial court in giving curative instructions to the jury following the remark complained of by the plaintiff. It is significant the plaintiff has seized upon the typographical error or the slip of the tongue and triumphantly thrusts it at this Court as an example of how unfairly he has been treated in the trial court.

For the entire picture of what occurred concerning the Court's remark to counsel, it is only necessary to refer to pages 383 through 393 of the record in this case. Basically the attorney representing the plaintiff made an objection to a certain line of cross-examination, the objection was overruled whereupon the plaintiff's attorney attempted to argue and submit his own unsworn testimony as what his intention was, which improper conduct was cut-off by the simple, truthful statement of fact by the Court "It is your intention to withhold information."

As recognized by the Court below, the trial court was not undertaking to suggest any moral criticism but merely observing in effect that the plaintiff did not think the evidence should be brought to the jury's attention, i.e., that it was not properly admissible. However, to remove any possible taint or question about the matter, the Court requested the counsel for the plaintiff to prepare a curative instruction which would be given by the Court. After a considerable lapse of time, the plaintiff had only a partially worded instruction which, however, the Court accepted and made the basis of an instruction to the jury which undoubtedly cured any possible misconstruction any member of the jury might have that the Court was casting aspersions on the plaintiff's counsel.

It is here that the plaintiff claims that a remark which is clearly either a typographical error in the record or at most a slip of tongue by the Court so prejudiced the four day trial (even though immediately followed by what even the plaintiff must agree is an absolutely correct instruction) prejudice is demonstrated as a matter of law.

This position is astonishing. The Court below quoted the trial court as follows:

> "You are instructed that the Court did not mean to imply that plaintiff has or is attempting to improperly withhold evidence in the case. My ruling is simply that defendant will be allowed to interrogate the plaintiff concerning his claims in the case."

The plaintiff complains that actually the record reads ". . . or is attempting to *properly* withhold evidence . . ." rather than "improperly". That such is a typographical error is so clear the Court below did not even comment on it. Even if the statement had been made as the record indicates, it would clearly have been a slip of the tongue, otherwise what the Court was doing would make absolutely no sense at all. Particularly does the plaintiff's position in this regard seem absurd when it is recalled that the Court was attempting to follow an instruction at least partially worded by the plaintiff's attorney himself, which prepared instruction so far as this record goes may well have been exactly as is presently shown in the record.

In any event, and regardless of whether a typographical error or a slip of the tongue is involved, the matter was conclusively settled by the appropriate instruction which, is not under attack even by the plaintiff's attorney. Since the plaintiff's attorney did not however see fit to quote the second instruction in his brief, the same is here set forth:

> "The Court: I will read it again. You are instructed that the Court did not mean to imply that the plaintiff has or is attempting to withhold properly admissible evidence in this case. I added the comment that the basis of my ruling is that the defendant may interrogate the plaintiff concerning his claims in the case."

The plaintiff cites no case even remotely in point to sustain his contention the remark by the Court was prejudicial error. Indeed the remark itself was probably not error, and even if such might be error, it clearly would not be prejudicial even in the absence of curative instructions. But where as here explicit, positive instructions were given to the jury not to in any way construe the remark as the plaintiff now says he fears it might be construed, to contend prejudice resulted as a matter of law is, to put it most kindly, unsound.

Although it is difficult to tell from his petition, apparently the plaintiff has abandoned any serious complaint concerning the trial court's excluding the evidence showing the compensation carrier did not pay compensation benefits or medical benefits as a result of the plaintiff's 1957 back injury, approximately one year prior to the accident claimed to have occurred as a basis for this suit. The abandonment of such a contention would certainly appear appropriate. The plaintiff testified he lost no time from the 1957 accident, received no medical pension and made no claim of any sort. Certainly this defendant did not contest the only possible facts the document in question might tend to show, i.e., that the plaintiff had made no claim for either lost time or medical benefits as a result of the 1957 injury. It is hornbook law that the exclusion of evidence is harmless where the facts sought to be proved are otherwise proved and the evidence is merely cumulative and repetitious. See 3 *Am. Jur. Appeal & Error*, (1951, page 587.

As succinctly stated by the United States Court of Appeals for the Second Circuit in *Smith* v. *Bear* (2 Cir.) 237 F. 2d 79, at page 89:

> "Even if the memoranda were admissible as made in the regular course of business, their exclusion by the

> trial court was not prejudicial. See Rule 61, Federal Rules of Civil Procedure. The memoranda was offered as proof of the matter asserted therein. As noted above, the facts material to this controversy which were set forth in the memoranda were already in evidence in other testimony and were not disputed by defendants. We cannot see how plaintiff's cause was harmed by the exclusion of the memos."

In summary, no one has analyzed the case better than Circuit Judge Brown, when he stated:

> "After a long and hard, well fought trial, the jury, with ample int asic and extrinsic evidence and the opportunity to observe the witnesses close at hand, concluded that the accident never took place. That was the function of the jury, and neither of these two isolated episodes infected the result. That is the end of it."

It certainly should have been the end of it.

CONCLUSION

The petitioner is seeking in this Court to overturn the unanimous verdict and opinion of twelve fair minded and impartial jurors, based upon evidence submitted to them admittedly ample to sustain this verdict. Four Judges have unanimously agreed upon study of the entire record that no erro of law tainted the verdict or in any way prejudiced the rights of the plaintiff. Under these circumstances, to reverse this case in order to improve the "image of the courts in action in the mind of the petitioner and his circle of friends . . ." is hardly the purpose for which this Honorable Court exercises its discretionary jurisdiction in granting writs of certiorari.

It is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

.....

W. C. HARVIN

.....

MILAS C. BRADFORD, JR.

Of Counsel:

BAKER, BOTTS, SHEPHERD & COATES

CERTIFICATE OF SERVICE

Copies of the foregoing were served upon W. A. Combs, Esquire, State National Building, Houston, Texas, and W. Jiles Roberts, Esquire, 617 Americana Building, Houston, Texas, attorneys for petitioner, by depositing same in the United States mail, postage prepaid, certified mail, properly addressed on this ..... day of February, 1964.

.....

W. C. HARVIN